

EPA’S Response to July 12, 2022 Request for Dispute Resolution by Daimler Trucks North America LLC, Cascade General, Inc., Shipyard Commerce Center LLC and Vigor Industrial LLC (“Respondents”)

Swan Island Basin Project Area Portland Harbor Superfund Site, Portland, Oregon

I. Background

The Portland Harbor Superfund Site (Site) is currently in the Remedial Design (RD) phase of cleanup. Potentially Responsible Parties (PRPs) will follow these remedial designs to implement Remedial Action and construct the remedy. EPA negotiated 11 Administrative Settlement Agreements and Orders on Consent (ASAOCs) covering RD at 14 Project Areas and issued two Unilateral Administrative Orders (UAOs) covering two Project Areas, for a total of 16 RD Project Areas at the Site. EPA is performing RD at a 17th Project Area. Each ASAOC and UAO requires parties to perform RD as well as pay EPA future response costs.

This dispute concerns one of the 17 Site Project Areas, the Swan Island Basin Project Area. This Project Area is located between approximately River Mile 8.1 and River Mile 9.2 on the northeast side of the Willamette River. The RD ASAOC for this Project Area (Attachment A) was executed on January 20, 2021. The parties to the ASAOC are Daimler Trucks North America LLC, Vigor Industrial LLC, Cascade General, Inc., and Shipyard Commerce Center LLC (Respondents) who are performing RD and have brought this dispute; the Maritime Administration, United States Coast Guard, United States General Services Administration, Bonneville Power Administration, and United States Department of Defense (Settling Federal Agencies) which are funding RD; and the State of Oregon, acting by and through the Oregon Department of State Lands, the City of Portland, and the Port of Portland (Settling Public Entities), which are also funding RD. EPA understands that there is also a side funding agreement by which additional PRPs are also providing RD funding for this Project Area.

Completion of RD for each Project Area includes several activities. Some of those activities and associated costs are common to and benefit all Project Areas and some are specific to only one Project Area. This dispute concerns costs that are common to and benefit all Project Areas. These costs fall within the definition of EPA Future Response Costs contained in the RD ASAOCs and UAOs, including that they are not inconsistent with the National Contingency Plan (NCP), as required by Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a), and the NCP § 300.700(c).

For those activities that are common to and benefit all Project Areas, EPA set up an accounting code known as “10TC” to track such costs. These costs are divided equally between the Project Areas, since each Project Area benefits from the activities billed to the 10TC code. EPA considered setting up a separate code for each Project Area but chose to use one code for efficiency and cost savings. Respondents, who are the ASAOC parties performing the RD for the Swan Island Basin Project Area (Respondents do not include ASAOC parties who are funding but not performing the RD), dispute those 10TC costs billed to their Project Area (Attachment B). Examples of activities covered under the 10TC cost code include:

- Programmatic Biological Assessment development
- Flood Rise Model development

- Meetings: Technical Coordination Team meetings, Portland Harbor Collaborative and Community Advisory Group meetings, general community meetings (unless they are related to one Project Area or not remedial design-related)
- Preparation for and meeting with performing parties on general remedial design topics (e.g., flood rise meetings, buried contamination meetings, dioxin/furan background study meetings)
- Development of plans necessary to perform RD oversight (e.g., Health and Safety Plan, split sampling quality assurance project plan)
- Community involvement activities and contracts related to RD (not meetings/activities relating to just one Project Area or to remedial action)
- Dioxin/furan background study to inform designs
- RD Guidelines and other RD document development
- Briefings to EPA management, congressional calls, tribal calls, other agency and EPA HQ meetings on Portland Harbor RD or working through issues relating to RD unless they are related to one Project Area
- RD-related contracts and cooperative agreements benefiting all Project Areas

In Spring 2022, EPA sent RD performing parties their first 10TC bills. EPA Remedial Project Managers informed parties performing RD at all the ASAOC and UAO Project Areas of EPA's billing plan for 10TC costs. Upon receipt of their 10TC bills, performing parties at eight Project Areas, including those who have initiated this formal dispute, contacted EPA to request informal dispute resolution, explaining that they were not clear from EPA's initial documentation about some of the costs billed. EPA organized calls with performing parties at each of these Project Areas to discuss concerns and provide additional information.

On July 11, 2022, EPA sent a letter to provide in writing the additional information requested by performing parties willing to resolve their informal disputes. The information in that letter was also verbally discussed with Respondents during the informal dispute resolution period. The information contained in the letter resolved the concerns of the performing parties at all the RD ASAOC Project Areas except the one that is the subject of this dispute. Those parties withdrew their disputes and have now paid their bills in full. That letter with its accompanying documentation is attached here for reference (Attachment C). With this resolution, the only remaining dispute is the current one.

Swan Island Basin Project Area Dispute

On April 21, 2022, EPA emailed Respondents a bill for their share of the 10TC costs as specified in Paragraph 41.a of the ASAOC. Prior to invoking formal dispute resolution, EPA and Respondents engaged in informal discussions to attempt to resolve our disagreement. During those discussions, Respondents asserted that EPA had not negotiated for the Swan Island Basin Project Area ASAOC to cover the costs billed to the 10TC account. EPA counsel shared again the email exchange between counsel for the agency and for Respondents which included the redline draft ASAOC dated October 20, 2020 (Attachment D), in which EPA counsel noted and explained these 10TC costs, as they had been previously discussed on the phone. Respondents then dropped that assertion and instead now argue the following:

- 1) The ASAOC does not require payment of costs incurred prior to September 1, 2020; and
- 2) Not all 10TC costs billed benefit all Project Areas at the Site, and specifically they do not benefit the Swan Island Basin Project Area where Respondents are performing RD work.

Our responses below are organized to follow, section by section, the issues raised by Respondents in their letter dated July 12, 2022.

II. Summary of EPA's Requested Decision from the Dispute Official

EPA requests the dispute official to determine that:

- 1) The ASAO language does require payment of the 10TC costs billed to the Swan Island Basin Project Area, because the ASAO specifies that "EPA Future Response Costs shall also include, but not be limited to, direct and indirect costs *paid or incurred by EPA*, prior to the Effective Date [January 20, 2021], in connection with negotiating this Settlement and charged to account 10SW beginning on September 15, 2020, *and account 10TC beginning on September 1, 2020*" (emphasis added, definition of "EPA Future Response Costs," ASAO at para. 10), and EPA made the first payment of these costs on September 21, 2020, after the start date of September 1, 2020 for billing 10TC costs;
- 2) The 10TC costs EPA has billed do benefit the Swan Island Basin Project Area and are necessary to Respondents' performance and completion of the RD work, as required by the ASAO; and
- 3) Consistent with the other ASAO respondents who have paid this bill, the Swan Island Basin Respondents must pay the 10TC costs billed to them.

III. Swan Island Basin Project Area ASAO Definition of Future Response Costs

In Section I.A of their July 12, 2022, letter, "Key Definitions," Respondents state that, "the Settlement specifically defines, in the last two sentences of the definition [of EPA Future Response Costs], what are NOT EPA Future Response Costs." Respondents refer to these costs as "Excluded Costs."

Paragraph 9 of the ASAO defines "EPA Future Response Costs" as follows:

"EPA Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the EPA incurs in reviewing or developing deliverables submitted pursuant to this Settlement for the Swan Island Basin Project Area, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Section IX (Property Requirements) (including, but not limited to, cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions, including, but not limited to, the amount of just compensation), ¶ 73 (Work Takeover), ¶ 17 (Emergencies and Releases), ¶ 99 (Access to Financial Assurance), ¶ 18 (Community Involvement (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. §9617(e)), and the costs incurred by the United States in enforcing the terms of this Settlement, including all costs incurred in connection with Dispute Resolution pursuant to Section XIV (Dispute Resolution) and all reasonable litigation costs. *EPA Future Response Costs shall also include, but not be limited to, direct and indirect costs paid or incurred by EPA, prior to the Effective Date, in connection with negotiating this Settlement and charged to account 10SW beginning on September 15, 2020, and account 10TC beginning on September 1, 2020. EPA Future Response Costs shall not include the costs of EPA oversight or data collected by EPA concerning any other response action or Settlement Agreement associated with the Site or other activities that do not specifically pertain to this Settlement including the implementation of the attached SOW. EPA*

Future Response Costs shall not include costs incurred by SFAs [Settling Federal Agencies] or costs incurred by any department, instrumentality, or agency of the United States that are not related to overseeing and/or performing the Work (emphasis added).

As discussed below, EPA's 10TC charges to the Swan Island Basin Project Area were paid by EPA after the September 1, 2020, date specified in the ASAOC, and they are specific to this Project Area and necessary for completion of the work required by the ASAOC. Respondents are only being charged for their share of these costs. Other parties are paying for their own portions of the 10TC costs.

IV. Respondents' Financial Concerns

Respondents state at Section I.B of their letter that they have financial concerns and did not agree to the charges for items included in the 10TC bill because some were incurred prior to September 1, 2020; were not within the scope of what Respondents negotiated; and are related to other Project Areas. As further discussed below, the ASAOC provides for payment of 10TC charges paid by EPA after September 1, 2020; the plain language of the ASAOC clearly articulates that the charges are within the scope of what was negotiated by the parties; and EPA has only charged the Respondents for an equitable portion of the 10TC RD costs.

V. Timing of 10TC Costs Billed

In Section II.A of their letter, Respondents argue that they must pay only the 10TC costs for work that benefits every Project Area and incurred after September 1, 2020. The executed ASAOC as well as documentation of the ASAOC negotiations demonstrate the intent of the parties to require reimbursement of costs that were incurred or paid after September 1, 2020. ASAOC paragraph 10. See October 20, 2020 email from Stephanie Mairs to Jennifer Sanscrainte with negotiation draft ASAOC (Attachment D, with definition of "EPA Future Response Costs" explained). The ASAOC does not say that Respondents must pay costs incurred and paid after that date. The ASAOC requires payment of 10TC costs incurred or paid by EPA after September 1, 2020. EPA paid the first bill on September 21, 2020, and under the terms of the ASAOC, these 10TC costs, having been paid after September 1, 2020, must be reimbursed by Respondents.

VI. Contractor and EPA Payroll Expenses

Section II.B of Respondents' letter contests certain contractor expenses and EPA payroll expenses. Respondents present several bases to support their objections: costs do not benefit all Project Areas; costs are specific to particular Project Areas (not including their Swan Island Basin Project Area); costs do not fall within the definition of Future Response Costs; and costs are excluded from the definition of Future Response costs under the ASAOC. Respondents argue that EPA has not provided enough information for them to determine whether costs should be paid, even though EPA has provided standard cost documentation and additional documentation, as requested.

The 10TC costs incurred at the Portland Harbor Site are for activities necessary for the completion of designs required under the ASAOCs and UAOs, and these costs meet the definition of Future Response Costs. Respondents have been billed only for their portion of these costs; parties performing RD at the other Project Areas have paid their portions for the areas where they are conducting work. Further, without these activities, the design would be deficient, and the Respondents could not complete an acceptable 100% design (i.e., EPA would find the design deficient).

Contractor Expenses

Respondents' Exhibit D to their Statement of Position highlights in red and orange activities, totaling \$64,653.23, that they are disputing. The reasoning for allocating this color coding is unclear, as the same activity that is highlighted in green in one invoice ("attended TCT [Technical Coordinating Committee] meeting," p. 202 of Exhibit D) is highlighted in yellow in another ("attended TCT meeting," p. 156 of Exhibit D), while highlighted red in another invoice ("attended TCT meeting," p. 144 of Exhibit D). These inconsistencies run throughout their submittal. EPA attempted to categorize the disputed (red and orange) highlighted costs below, with a response justifying why they are necessary for the completion of remedial design and are recoverable under the ASAOC.

- 1) EPA oversight contractor project management, planning, monitoring, and reporting costs (Tasks 1.1, 1.4 and 3.0)

EPA Response: The RD oversight contract with CDM Smith is necessary to perform our statutorily required oversight of the performing parties' designs. Administrative activities performed by the contractor include preparing invoices, modifying the contract, task management, change order processing and data management. Without these activities, EPA could not fund the contract and perform oversight activities. These activities are typical for any CERCLA oversight contractor and are always included as a reimbursable cost.

- 2) Remedial design technical assistance contractor support (Tasks 15.1 and 15.2)

EPA Response: Activities being disputed include contractor meetings with EPA, development of RD guidelines for potentially responsible parties (PRPs), tracking ASAOC progress, developing a biological assessment to comply with the Record of Decision's (ROD) Applicable or Relevant and Appropriate Requirements (ARARs), sufficiency assessment review and technical coordinating team meetings. These activities are necessary to complete RD, and the technical support the contractor provided allowed EPA to consult with our state and tribal partners, interpret and apply the ROD during RD, and fulfill our statutorily required obligation of meeting ARARs and complying with the ROD during RD.

- 3) Community Involvement Activities (Task 4.0)

EPA Response: Community involvement activities are critical during the Superfund process. EPA commits to perform these activities within a site's community involvement plan. Not all community involvement activities are charged to 10TC, only those directly related to remedial design.

A small number of community involvement costs in the 10TC bill were identified as Cathedral Park costs but are, despite this nomenclature, appropriately billed to the 10TC account. EPA received a request to organize preliminary design investigation (PDI) open houses so the community could better understand sediment coring during RD for Sediment Management Area (SMA) delineation at the Site. The request was not specific to Cathedral Park. EPA agreed that educating the public on this issue would be valuable and would fulfill obligations for community involvement under the NCP and Portland Harbor Community Involvement Plan. Instead of asking RD performing parties to host individual community events about each of their Project Areas, EPA used Cathedral Park as the surrogate to fulfill that community involvement need for all Project Areas. For this reason, this Cathedral Park event is a legitimate 10TC cost, one that aided in keeping costs down by avoiding multiple such events.

4) Health and Safety Plan (HASP) and Split Sampling Quality Assurance Project Plan (QAPP) development (Tasks 2.1 and 2.5)

EPA Response: Both these plans are necessary for EPA to provide oversight of the performing parties and ultimately approve the design being performed under the ASAOC. Remedial design requires a significant amount of fieldwork. In order to provide oversight of that fieldwork, EPA performs field oversight and conducts split sampling. The Agency requires a site health and safety plan to be in the field, and a split sampling QAPP is required to guide the split sampling.

5) Statistical Analysis and Data Management (Tasks 8.2 and 8.3)

EPA Response: These tasks allow for the creation and management of RD data throughout the site and on a common data platform as well as statistical analysis of that data to inform RD. Without the ability to manage the voluminous amount of RD data being generated at the site and develop site-wide guidance and decision making to support the RD process, RD could not be completed.

EPA Payroll Expenses

In Section II.B.2 of their letter, Respondents contest EPA payroll costs “in proportion to the CDM Smith costs disputed.” Respondents provide no justification for not paying these costs. The Certified Cost Recovery Package dated March 15, 2022 (see Attachment B), and provided to Respondents on April 15, 2022, only includes EPA payroll costs from Pay Period 25 of the calendar year 2020 and forward. Pay Period 25 of that year began on November 22, 2020, after the September 1, 2020, date to which Respondents agreed in the ASAOC. Respondents state that “[t]here is no additional documentation to explain what work was performed by the EPA employee”

EPA explained during informal negotiations that only EPA payroll costs for work entered into EPA’s payroll system after September 1, 2020, were included in the bill, and that the 10TC billing code was set up specifically to track costs related to remedial design work necessary for the completion of work required by each RD ASAOC and UAO and then equitably divided between Project Areas. As EPA explained during informal dispute resolution, tracking the costs in this manner is done to reduce time and costs of using a separate tracking code for each Project Area. As required by ASAOC paragraph 41.a, EPA’s bill follows the standard form, with the regular information, reviewed in our regular process, that we include in all of our Certified Cost Recovery Packages. EPA employees were required to attest to the time billed to account code 10TC, as they are required to do for all time billed to any EPA account code. Respondents provide no rationale for why they should not pay EPA payroll costs.

VII. Equity Concerns

Segregation of the 10TC costs is simply an accounting efficiency. Each individual activity could have been divided and included in each of the Project Area bills. However, with so many Project Areas, dividing it this way is impractical. For example, accurately dividing a one-hour meeting on the Biological Assessment by 17 isn’t possible in People Plus, EPA’s timekeeping system. Time must be entered into the timekeeping system in increments of quarter hours. A one-hour meeting split between 17 Project Areas would mean entering .25 hours to each of 17 billing codes, for a total billing of four hours and fifteen minutes rather than one hour. Additionally, EPA’s Remedial Acquisition Framework (RAF) contracts used in the CERCLA program nationally allows for one site code to be allocated per subtask (e.g., the Biological Assessment subtask cannot be allocated amongst 17 site codes). EPA employed this accounting approach because it was the most feasible, while saving time and money in the overall internal tracking of costs and for the performing parties.

All of the RD ASAOCs, including the Swan Island Basin ASAOC, require performing parties to reimburse EPA's oversight costs which include contractor costs and EPA payroll. There are parties under 14 other RD ASAOC's who received the same 10TC bill that the Respondents received, and all of those parties were satisfied by the documentation provided by EPA and have paid their portion of this bill. Swan Island Basin is the only Project Area where performing parties have formally disputed these costs. Respondents should pay their equitable portion of this bill.

VIII. Conclusion

The Swan Island Project Area 10TC bill is for costs that: fall within the definition of EPA Future Response Costs as described in the ASAOC; are not inconsistent with the NCP; are for activities that benefit the Swan Island Basin Project Area RD; and are necessary in order for Respondents to complete the remedial design work required by their ASAOC. These 10TC costs have been billed according to regular EPA billing processes; are for activities paid for by EPA after September 1, 2020, in accord with the ASAOC; and are equitable.